IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7336 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHUNILAL B SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 7336 of 2000

MR SAURIN A SHAH for Petitioner No. 1

MR PANCHOLI, APP, for Respondent No. 1

NOTICE SERVED BY DS for Respondents No. 2-3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 27/11/2001

ORAL JUDGEMENT

1. Leave to amend.

2. The petitioner herein is the accused in a

complaint lodged before learned Judicial Magistrate, First Class, Bhachau, vide Criminal Case No.49 of 1999, by respondents No.2 and 3 being a complaint for offence punishable under Section 138 of the Negotiable Instruments Act. The petitioner has approached this Court with this application under Section 482 of the Code of Criminal Procedure for quashing the order passed thereunder by the learned Magistrate issuing process.

3. The said order is challenged on the ground that the learned Magistrate has, without recording the statement of the complainant and thereby without satisfying himself about the genuineness of the complaint, taken cognizance and has issued process which is not permissible in law.

4. Learned advocate Mr. S.A. Shah has drawn attention of this Court to a certified xerox copy of the complaint and the order passed thereunder by the learned Judicial Magistrate, First Class, Bhachau on January 28, 1999. He has placed reliance on decision of the Apex Court in Tula Ram & Ors. v. Kishore Singh, AIR 1977 SC 2401 and that of this Court in Shankerbhai Mathurbhai Patel & Anr. v. Ramanlal Vrajlal Patel & Anr., 1991(1) GLR 387 to support his contention. He submitted that this petition may, therefore, be allowed, the order in question may be quashed and set aside and the learned J.M.F.C. may be directed to pass appropriate orders after following due procedure in the complaint.

5. The petition is opposed to by learned Additional Public Prosecutor Mr. Pancholi for respondent No.1-State. Respondents No.2 and 3 have been served with notice of Rule on December 27, 2000, but have chosen not to contest this petition.

6. This Court has considered the order impugned herein in light of the decisions relied upon by the learned advocate for the petitioner. This case would squarely be covered by the position of law as settled in the above cited judgments. Undisputedly, statement of the complainant has not been recorded and order is passed straightaway directing issuance of summons against the accused after registering the complaint. The cognizance is, therefore, taken straightaway. In this view of the matter, considering the decision of the Apex Court in Tula Ram (supra), it is clear that the learned Magistrate has to comply with the requirements of Section 200 of the Code of Criminal Procedure and record the evidence of the complainant or his witnesses before taking cognizance. Likewise, in the case of Shankerbhai Mathurbhai Patel

(supra), this Court also took a view that provisions of Section 202(b) have to be followed before taking cognizance. It was observed that a plain reading of Section 202 read with Section 202(b) makes it very clear that the Judicial Magistrate before directing inquiry ought to have examined the complainant and his witnesses, if any. Ultimately, the order in question was set aside. In view of the above settled proposition of law, as applicable to the facts of the present case, the petition deserves to be allowed and the same is allowed. The order in question, i.e. order passed by learned Judicial Magistrate, First Class, Bhachau, on January 28, 1999, below the complaint registered as Criminal Case No.49 of 1999, is quashed and set aside with a direction to the learned Judicial Magistrate, First Class that he shall proceed with the complaint in accordance with law. Rule is made absolute accordingly.

[A.L. DAVE, J.]

gt